79-140

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No._____

THOMAS R. FADELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OCTOBER TERM, 1978

No.

THOMAS R. FADELL,
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v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Thomas R. Fadell petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 3, 1979.

Opinion Below

The unpublished opinion of the court of appeals is reproduced as Appendix A. No opinion was rendered by the district court.

Jurisdiction

The opinion of the court of appeals affirming petitioners conviction was filed on June 4, 1979 and the judgment below was entered on that date.

Petitioner filed a petition for rehearing with a suggestion for rehearing in banc on June 18, 1979. On July 3, 1979 the Court below denied the petition for rehearing and rejected the suggestion for rehearing in banc. This petition is being filed within 30 days of said date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Is an indictment that is based solely on the unsworn hearsay testimony of the assistant federal prosecutor himself constitutionally permissible?
2. Is an offense that is charged under U.S.C. § 1503 which excludes on its face, and by the evidence, a pending judicial proceeding jurisdictionally fatally defective?
3. Was the Governments untimely action in causing a severance so as to deny the petitioner his most vital trial witness a denial of due process when the lower court refused the only request for a continuance made by petitioner so that the witness would be available at the trial?

4. Can a conviction be based upon the patent perjury on the record below of the governments chief witness? Can a jury disregard a tape recording of a conversation between the petitioner and the government's chief and sole witness as to certain elements of proof that clearly demonstrates that the chief witness has perjured himself on material points necessary for proof of essential elements of the offenses?

5. Can a conviction stand that is based upon the knowing use of perjured testimony by the federal prosecutors?

6. Can an Appellate Court rely on false "facts" found only in the prosecutors brief to affirm a conviction of a lower court, and memorialize false "facts" in its opinion?

7. Can a District Court allow a defendant to be tried on potential state charges in a federal trial? Can a District Court refuse to balance and weigh the danger of unfair prejudice of testimony of potential state violations against their need by the Government in its case?

8. Can a conviction be based solely upon an inference in support of an essential allegation of the indictment if an opposite inference may be drawn with greater consistency from the circumstances in proof?

9. Can a conviction be sustained when there is no evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt?

10. Can a conviction stand where the record is wholly devoid of any relevant evidence of a crucial element of the offense?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be held to answer for a ...infamous crime, unless on a presentment or indictment by a grand jury..."

Title 18 U.S.C. § 1510
Title 18 U.S.C. § 1503
Title 18 U.S.C. § 1623

The Fifth Amendment further provides:

" nor shall any person...be deprived of ...liberty, or property, without due process of law..."

Statement of the Case

No witness subpoenaed before the grand jury that indicted petitioner implicated the petitioner, Thomas R. Fadell, a lawyer, in any federal criminal offense. All witnesses used at the trial were readily available to appear before the grand jury. The grand jury, acting solely on the unsworn hearsay statements of an assistant federal prosecutor, indicted petitioner on sixteen (16) counts under Title 18, U.S. Code: Two (2) counts of false statement under § 1623, seven (7) counts of obstruction of justice under § 1510, and seven (7) counts of obstruction of justice under § 1503. In the same indictments, Mrs. Marie Samar, a legal secretary to Mr. Fadell was indicted on five (5) counts of obstruction of justice, and Mr. Edward Robinson, an employee in the office of the Calumet Township Assessor was indicted on one (1) count of obstruction of justice. After petitioner's trial the Government dismissed all counts

against Mrs. Samar and Mr. Robinson.

Six counts were dismissed prior to submission to the jury. Of the six (6) dismissed counts no evidence whatsoever was introduced as to three counts. The jury found the petitioner guilty of seven (7) counts, and could not agree as to three (3) counts. The court granted a new trial on one count of making a false statement.[1].

Post-trial the petitioner took a polygraph test at John Reid and Associates in Chicago, Illinois, one of the nation's leading polygraph examiners, which found that petitioner did not commit the perjury offense for which he stands convicted, and did not commit four of the five obstruction of justice counts, and was inconclusive as to the sole remaining obstruction of justice count.

At the trial the chief tactic of the federal prosecutor was to put petitioner on trial for potential state ghost-payrolling offenses. The federal implications of the indicted offenses were missing or negligible. The petitioner having been denied a bill of particulars and certain discovery was surprisedand unprepared to defend against potential state charges at the federal trial. The potential state violations overwhelmed the case and the jury. The petitioner consistently objected to the overwhelming prejudicial testimony as putting him on trial for offenses not alleged in the indictment. A post-trial juror interview bears out the contention that petitioner was convicted because of the overwhelming prejudicial testimony of potential state offenses.

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[1]A polygraph test, which the Court permitted to be made a part of the record, but not admitted into evidence, cleared petitioner of this charge.

The most vital defense witness that petitioner had was his legal secretary, Marie Samar, who was effectively eliminated as a defense witness by the untimely tactic of the federal prosecutors in obtaining a last-minute severance.

Four days before the trial was to commence the Government filed a motion to disqualify the attorneys for Mr. Edward Robinson and Mrs. Marie Samar, Lowell Enslen and William Enslen. The reasons alleged by the Government to disqualify the Enslens were known to the federal prosecutors for over six (6) months prior thereto. The Enslens withdrew and Mrs. Samar and Mr. Robinson were severed from the trial. At this time both Mrs. Samar and Mr. Robinson intended to testify at the trial. The petitioner asked for a continuance on the grounds that the testimony of Mrs. Samar, in particular, and also of Mr. Robinson, was vital to his defense, and that he assumed that their new lawyers, being unfamiliar with the case, and with their trials pending, would insist that their clients take the 5th Amendment when subpoenaed as defense witnesses. The Court refused the continuance. Mrs. Samar and Mr. Robinson declined to testify when subpoenaed by the defense as anticipated, invoking their privilege against self-incrimination. Post-trial, Mrs. Samar submitted an affidavit refuting crucial portions of the sole witness the Government had as to certain essential elements of proof in five (5) counts.

Tape recordings made by petitioner, of conversations between the petitioner and the chief government witness, were played into evidence and showed the chief government witness to have perjured himself on certain

essential allegations needed to be proved by the prosecutors. The only "proof" offered by the prosecutors was the patent perjury on the record of the chief government witness on five (5) of the six (6) counts. No attempt was made by the federal prosecutors during the trial to correct the perjury of their chief witness after they became aware of it.

The petitioner during trial furnished the prosecutors with several tape recordings of conversations between petitioner and government witnesses. Although the prosecutors were aware of the accurate conversations and times of the conversations, they proceeded to knowingly use perjured or false testimony of these witnesses as to the substance and time of the recorded conversations.

As to three (3) counts the only "evidence" that petitioner supposedly knew of a federal investigation (although no testimony was had that in fact there was a federal investigation as required by § 1510 during the pertinent time frame) was the inference allowed by the district court over objection that during a successful tax refund claim in the U.S. Court of Claims he requested of the Internal Revenue Service his file under the Freedom of Information Act. Without this "inference beyond a reasonable doubt" allowed at the trial all the § 1510 counts would have failed and have been dismissed.

As to the perjury or false statement count the indictment alleges that petitioner lied when he said before the grand jury that he never knew anything as a "control card" in the assessors office. The petitioner and ten long-time employees of the assessors office said they never heard of a "control card". Only the chief government witness said he and petitioner prior to the grand

jury appearance had used the words "control cards" for things which were known for over twenty years as "business record sheets".[2] No other witness testified that they ever heard petitioner in twenty years ever use the terminology "control cards".[3]

The indictment on its face, and the evidence at the trial, excluded a pending judicial proceeding at the time of the alleged offense in Count X, a § 1503 offense.

As to Counts III, IV and XV there was NO evidence introduced to support the essential elements of proof or to justify a finding of guilt beyond a reasonable doubt. There being no relevant evidence there is no question of the sufficiency of the evidence. The Appellate Court filled in the void in the proof by adopting fabricated "facts" found in the federal prosecutor's appellate brief, or by referring to conduct clearly directed to non-federal concerns. The Government's brief in the Court of Appeals contained over twenty false statements of fact on material points. The Appellate Court adopted

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[2]The afore-mentioned tape recordings in evidence clearly showed the sole government witness was committing perjury when he put the words "control cards" in petitioner's mouth prior to the grand jury appearance.

[3]The two witness rule prevailing in Indiana and the majority of the states, and under Title 18 U.S.C. § 1621 would have prevented a conviction herein.

over twelve of the false "facts" not found in the trial transcript to affirm the convictions below. The only conclusions is that, although the falsity of the "facts" were clearly outlined in petitioner's reply brief, the Appellate Court decided to affirm the convictions and then adopted the false "facts" without verifying the questioned facts with the trial transcript.

The Court of Appeals in its opinions has only one sentence directed to the perjury conviction, at page 3 and it misstates the facts and the evidence. It says petitioner "falsely (stated) to the grand jury that there were no records in the assessors office known as "control cards", when in fact the indictment makes no such allegations. The petitioner said he knew nothing as a "control card". The evidence was overwhelming that he spoke the truth.

Reasons for Granting Writ

The decision below conflicts with this Court's decision in In re Winship, Jackson v. Virginia, Wood v. Georgia, Ungar v. Sarafite, and Napue v. Illinois. It conflicts with decisions of the 3rd Circuit and D. C. Court of Appeals that hold an inference must be beyond a reasonable doubt on a crucial element of the offense and cannot be relied upon if it is as or more consistent with innocence than guilt.

The 7th Circuit has so far departed from the accepted and usual course of judicial proceedings by rendering a decision based on "facts" fabricated by the prosecutor in his brief and by finding "facts" and "evidence" regarding the perjury count that are outside

the indictment and testimony so as to question the fairness of the appellate review, and to raise serious questions if the appellate review denied pettioner due process of law.

I.

The decision below violates the rationale of Wood v. Georgia and conflicts with the 5th. Circuit case of U.S. v. Hodge which held that an indictment based solely on the informal unsworn hearsay testimony of the federal prosecutor himself is constitutionally impermissible.

The Court below did not address itself to the petitioners contention that NO evidence implicating petitioner in any federal crime was heard by the grand jury that indicted him; and that the indictment was obtained solely on the informal, unsworn, hearsay statements of the assistant federal prosecutor. In Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962) this Court said the grand jury "has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused...to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." L. Ed. p.580. The federal prosecutors admit in their brief below that no witnesses before the grand jury implicated petitioner in any federal crime. They do not deny that the indictment was returned based on the unsworn hearsay statements made to the grand jury by the assistant federal prosecutor. The 5th. Circuit has held that an indictment based on the "informal unsworn hearsay from the

mouth of the prosecutor" is interdicted by the 5th. Amendment. U.S. v. Hodge 496 F. 2d 87, 88 (5th. Cir. 1974). U.S. v. Arcuri (DC NY 1968), 282 F. Supp. 347, affirmed 2d Cir. 1968, 405 F. 2d 691, cert. den. 89 S. Ct. 1760, 395 U.S. 913, 23 L. Ed. 2d 227, held that an indictment should be dismissed when it is "deliberately" founded on hearsay and when more satisfactory evidence is "readily available".

II.

The decision below is in conflict with Pettibone v. U.S. and the unanimous decision of all other circuits that have considered the question and held that under 18 U.S.C. § 1503 it is a jurisdictional requirement to a charge that there must be a pending federal judicial proceeding.

This court and all circuits which have considered the question have held that an essential element of an 18 U.S.C. § 1503 prosecution is that there was a pending judicial proceeding that equates to an administration of justice and an investigation by the F.B.I. or I.R.S. or other government agency would not constitute a judicial proceeding. Pettibone v. U.S., 148 U.S. 197, 13 S. Ct. 542, 37 L. Ed. 419 (1893); Haili v. U.S., 260 F. 2d 744 (9th. Cir.1958); Cotton v. U.S., 409 F. 2d 1049 (CA 10 1959) Cert. den. 396 U.S. 1016, 24 L. Ed. 2d 507, 90S. Ct.577;Walter v. U.S., 93 F. 2d 792 (CA8 1938) See 20 ALR Fed 737 (common element is the necessity of a judicial proceeding, because §1503 does not punish conduct, however reprehensible, where there is no justice being administered which can be obstructed.)

When the "pending judicial proceeding" test is applied here Count X is jurisdictionally fatally defective. The Appellate Cout below has stretched the statute to cover a case clearly not within its purview. It apparently found a possible conspiracy to violate § 1503 before any pending judicial proceeding, although no charge under the conspiracy statute, 18 U.S.C. § 371, was made or tried.

III.

The decision below violates the holding of Ungar v. Sarafite because it allows the trial court to refuse a continuance where the ends of justice clearly required it to be granted; and allowed prosecutorial misconduct to impair petitioners defense.

Four days before trial the prosecutors filed a second motion to disqualify counsel for the co-defendants. The Court granted the motion and severed the trial of the co-defendants. The petitioner asked for a continuance, on the ground that the co-defendants planned to be his defense witnesses at the trial, and a severance would effectively result in denying him his most vital witness, Marie Samar, as her new counsel would not allow her to testify at petitoners trial when her trial would be at a later date. In Ungar v. Sarafite, 375 U.S. 575,84 S. Ct. 841, 11 L. Ed. 2d 921 (1964) this Court said "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is

denied. (L.Ed.p. 931, U.S. p.589)

Requiring petitioner to proceed to trial without Mrs. Samar as a defense witness was like cutting off a boxer's arm and then requiring him to defend his title. The prosecutors delay for over six months in bringing to the Court's attention alleged information that caused a severance and denied petitioner his most vital witness is a form of misconduct or negligence that deprived petitioner a fair trial and due process of law. The negligent suppression of evidence, though it is not "shocking" or "lawless" could violate the Constitution. Levin v. Clark, 408 F.2d.1209, p. 1211 (CA DC 1967). The Government's action is a form of misconduct that impaired petitioners defense. See U.S. v. Heath, 260 F 2d 623 (9th. Cir. 1958)

IV.

The decision below violates the holding of Napue v. Illinois because it allows the federal prosecutors to knowingly utilize perjured and false testimony.

After the trial had commenced the Government received from the petitioner several tape recordings of conversations between petitioner and government witnesses. The prosecutors none-the-less allowed its witnesses to testify so as to contradict their words on the tape recordings, and took no action to correct the obvious perjured or false testimony. Likewise, the federal prosecutors argued as "facts" things which they knew from the tape recordings to be false.

It is a denial of due process of law under the 5th and 14th Amendments to the U.S. Constitution to gain a conviction by the knowing use of false or perjured testimony on a material point. Prohibition of the knowing

use of false testimony to obtain a conviction is "implicit in any concept of ordered liberty." Napue v. Illinois, 360 U.S.264, 79 S.Ct. 1173 3 L. Ed. 2d 1217 (1959), U.S. v. Banks, 383 F. Supp. 389 (1974)

V.

The decision below violates the due process clause of the U.S. Constitution because it allows a Circuit Court to use false "facts" to support its opinion.

The Court of Appeals has found as material "facts" in its opinion certain things that have no basis in the transcript of the trial but were "facts" fabricated by the federal prosecutors in their brief below. (Examples are attached as Appendix C.) Going one step further, in the only sentence devoted to the false statement (perjury) conviction in the opinion the Appellate Court misstated the facts and evidence. It said petitioner stated "to the grand jury that there were no records in the Assessors Office known as "control cards". The Indictment makes no such allegation. Petitioner said he knew nothing in the Assessor Office as a "control card." Eleven witnesses corroborated the petitioner. Only one witness, granted immunity, refuted his testimony, and that witness's testimony on the trial record was made patently false by a tape recording of his conversation in evidence. The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In re Winship, 397 U.S.358 (1969). The record evidence herein could not reasonably support a finding of guilt beyond a reasonable doubt. On the perjury conviction below the record evidence would not reasonably support a finding in a civil case of a "preponderance of the evidence."

Can a jury in a criminal case disregard the like testimony of thirteen (13) persons, and convict upon the opposite testimony of one person who was granted "de facto" immunity from perjury, and had an axe to grind against petitioner?

VI.

The district court's refusal to weigh both the prejudice and the probative value of testimony of potential state offenses in the spirit of Rule 403 resulted in petitioner being convicted for potential state crimes.

The Appellate Court ignored the legal distinction between conduct allegedly focused at a state or personal level and conduct focused at a federal level. Only in this fashion could it find some "evidence" to support a conviction herein.

As the prosecutors had no evidence (1) that petitioner was aware of any federal investigation, (2) that, in fact, a federal investigation was conducted during the time period involved, and (3) that petitioner ever discussed any federal investigation or potenial federal crimes with anyone it became necessary, as a trial tactic, to try petitioner for potential state employer-employee ghost payrolling offenses. The district court allowed unlimited evidence of potential state offenses although they had no federal implications or consequences. The end result was that petitioner was put on trial for state offenses not alleged in the indictment. Petitioner was ambushed at the trial, was caught by surprise, and was unprepared to try state offenses at the trial below.

The Appellate Court struck the polygraph test that showed petitioner did not attempt to obstruct any federal investigation and did not commit perjury.

In its opinion the Appellate Court adopted the fabricated "facts" in the prosecutor's brief and utilized innocuous acts and concluded that perhaps they had something to do with a federal matter. The evidence was overwhelming and without contradiction that petitioners conduct was directed at a newspaper investigation and his concern that disgruntled ex-employees would try to implicate him in state ghost-payrolling offenses. Title 18 § 1510 & 1503 offenses do not contemplate newspaper or state investigators.

The district court was troubled by the conviction on Counts III, IV and X and said in open court that it had "grave misgivings" about these convictions, and that they hung by the "thinnest of threads."

The convictions in this case can only be explained by a jury over-whelmed by collateral prejudicial matter concerning potential state offenses.[4]

It appears the Appellate Court has succumbed to a dangerous judicial temptation, exemplified by affirmance in this case, to sustain a conviction involving a public official irrespective of all the attendant irregularities of procedure and evidence, and prosecutorial misconduct.

Certiorari should be granted to emphasize that a public official is entitled to the protection of the tests set out in In re Winship, supra and Jackson v. Virginia, No. 78-5283

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[4]A juror interview substantiates that the potential state offenses caused the convictions.

VII.

The opinion below conflicts with the majority view of Courts of Appeals which have held that an inference as to an essential element of proof must be beyond a reasonable doubt to support a conviction and cannot rest on evidence that no more supports guilt then innocence.

The 7th. Circuit apparently overruled or ignored its own decision in U.S. v. Litberg, C.A. Ill. 1949) 175 F. 2d 20 that an inference may not properly be relied upon in support of an essential allegation of the indictment if an opposite inference may be drawn with equal consistency from the circumstances in proof. U.S. v. Russo, (3 Cir. 1941) 123 F. 2d 420; In re Brown, 454 F. 2d 999, 147 U.S. App. DC 156 (1971) and Spalitto v. U.S. 39 F. 2d 782 (CA8 1930) hold that inferences and circumstantial evidence alone must be inconsistent with innocence to sustain a conviction.

The only evidence, if it can be called evidence, that petitioner knew of a federal investigation[5] was that during a pending income tax refund claim in the U.S. Court of Claims petitioner requested on December 9,1976 his I.R.S. files. Without the December 9th letter the trial court would have dismissed Counts III, IV, and probably X, as it had dismissed similar counts occurring prior to December 9th.

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[5]The federal prosecutors argued that David Krevitz talked to petitioner on December 9, 1976 and that this conversation motivated the December 9th FOIA request, even though during the trial the prosecutors learned from a tape recording that the Krevitz conversation took place January 7, 1977. Post-trial during a deposition, Krevitz admits the conversation was about January 7, 1977.

It is obvious that the seeking of his I.R.S. file under the F.O.I.A. during a pending and successful income tax refund claim in the U.S. Court of Claims is overwhelmingly consistent with innocence, and petitioner was seeking a right accorded him by law.

To allow convictions based on an inference from the F.O.I.A. request refutes the holdings in In re Winship, supra and Jackson n. Virginia, supra. that the Constitution prohibits convictions on conjecture and speculation.[6]

VIII.

The decision below violates the holding of In re Winship, Jackson v. Virginia, and Thompson v. Louisville, 363 U.S. 199.

On four counts of obstruction of justice there is no evidence to sustain a conviction. Only by mental gymnastics was it possible to infer that non-criminal acts directed toward a newspaper investigation were really federal crimes directed toward a federal investigation that never existed.

Only by ignoring the eleven (11) witnesses who corroborated petitioners testimony that he never heard of a "control card", by striking the polygraph test that showed he was not guilty of perjury and by ignoring the decisive tape recording and misstating the facts and evidence in the Appellate opinion was it possible to affirm the perjury conviction.

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[6]Not a scintilla of evidence was introduced at the trial that there was a federal investigation of petitioner during the times involved herein.

Nothing is more reprehensible than to cavalierly stigmatize a lawyer as a perjurer on evidence that could not meet the burden of proof in a civil case. The sole remaining obstruction count fails once the perjury count fails. Petitioner could not intentionally destroy something that he never knew existed.

The opinion below further conflicts with Thompson v. Louisville 362 U.S. 199 and In re Winship, supra in that the record below is totally devoid of any relevant evidence of a crucial element of the Title 18 U.S.C. § 1510 offense to wit: that petitioner was aware of a federal investigation or investigator, as defined, and that there was in fact an investigation actually being conducted.

The Appellate Court apparently found that because an investigation was authorized in October 1976 that one, in fact, actually was being conducted. The trial record is devoid of any evidence that any investigation by the I.R.S. was actually conducted before April, 1977. The trial record is wholly devoid of any relevant evidence that petitioner was aware that any federal investigator was in-investigating prior to April 6, 1977, and is totally devoid of any evidence that petitioner had any concern for any federal consequences of his prior actions.

The Appellate Court's affirmance flies in the face of In re Winship that the Due Process Clause protects petitioner from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he was charged."

"In all cases the Constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances

would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." Glasser v. U.S. 315 U.S. 60, 67 (1942)

Certiorari should be granted to insure that a conviction based upon conjecture and speculation does not go unremedied, and that the tests found in In re Winship and Jackson v. Virginia are studiously applied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of Certiorari should be granted.

Respectfully submitted,

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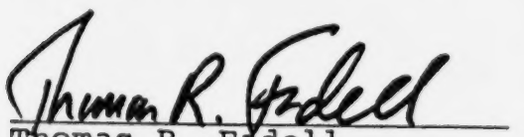

Thomas R. Fadell
Petitioner

July-1979

Appendix

Appendix A: Opinion and judgment of the United States Court of Appeals for the 7th Circuit.
Appendix B: Indictment
Appendix C: Examples of false "facts" contained in Appendix A (Opinion of 7th Circuit.)

Appendix D: Title 18 U.S.C. § 1503

Appendix E: Title 18 U.S.C. § 1510

Appendix F: Title 18 U.S.C. § 1623

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

ARGUED JANUARY 4, 1979

June 4, 1979

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. William J. Bauer, Circuit Judge

UNITED STATES OF AMERICA,	)	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
Plaintiff-Appellee,	)	
No. 78-1186 vs.	)	
THOMAS R. FADELL,	)	
Defendant-Appellant.	)	No. H CR 77-59 Phil M. McNagny, Judge.

Appendix A

ORDER

On December 8, 1977, Calumet Township Assessor Thomas R. Fadell was found guilty of five counts of obstructing justice and one count of perjury in connection with his alleged attempts to impede a federal grand jury investigation of possible criminal tax violations. Fadell now appeals, alleging numerous errors in the proceedings below. For the following reasons, we affirm the judgment of the district court.

We may begin with the appellant's claim that the evidence was insuffucient to support his conviction under Counts III and IV of the indictment. The two counts charged Fadell with endeavoring to obstruct, delay or prevent Bart M. Kusmierz, a former employee of the County Assessor's Office, and Helen Kravas Fadell's legal secretary, from communicating information to federal investigators in violation of 18 U.S.C. § 1510.

The evidence at trial established that the Internal Revenue Service officially opened an investigation on the appellant in October, 1976, after receiving information from John Svaco the previous month. Moreover, according to the government, there was also evidence at trial to show that Fadell had "focused his concern" on such an investigation--in particular, his December 1976 Freedom of Information Act request to the Internal Revenue Service. The appellant argues, however, the FOIA request, standing alone, is as consistent with innocence as it is with guilt. He therefore claims that the government's evidence was insufficient to establish the requisite scienter under 18 U.S.C. § 1510.

In deciding the issue, we note first an appellate court must look to the evidence as a whole to determine its sufficiency. As the Second Circuit has stated:

> "But to say . . . that all inferences drawn from facts in evidence must be consistent only with guilt and inconsistent with every reasonable hypothesis of innocence, or that there must be no reasonable doubt as to each chain of the proof is to confuse the function of judge and jury, as well as the nature of the proof required in criminal cases. The requirement of proof beyond a reasonable doubt is a direction to the jury, not a rule of evidence; it operates on the whole case, and not on separate bits of evidence each of which need not be so proven; and it cannot be accorded a quantitative value other than as a general cautionary admonition. It is the court's function to decide whether evidence is competent to justify certain inferences; it is not the court's function to decide which of various inferences should be drawn. Nor is the jury to be limited to drawing only the in-

> ference most favorable to the accused. Such a rule would virtually eliminate circumstantial evidence as a means of proof. It is not the generally accepted rule." United States v. Valenti, 134 F.2d 362, 364 (2d Cir. 1934) (citations omitted).

When viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), the evidence at trial[1] established the following salient facts: (1) Fadell became very upset upon learning that David Krevitz had provided a local newspaper with an affidavit which claimed that he (Krevitz) had done work in Fadell's personal businesses while being paid by the Assessor's Office; (2) Fadell wrote a letter to the Internal Revenue Service on December 9, 1976 which requested his entire file under the FOIA; (3) Fadell prepared (with the assistance of his accountant) a false counter-affidavit which was sent to the reporter; (4) Fadell attempted to force the new employer of Bart Kusmierz to fire

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[1]We note in this connection that we have granted the government's motion to strike from the appellant's brief (1) all references to a polygraph examination taken by Fadell; and (2) a "Motion to Reconsider Motion for Judgment of Acquittal After Verdict" and a "Motion for New Trial Due to New Evidence and Information," as well as related appendices.

Kusmierz; (5) Kusmierz feared that Fadell was trving to "shut (me) up"; (6) Fadell revealed to Helen Kravas that he was concerned about a criminal investigation by a grand jury; (7) Fadell intimated to Kravas that she could receive a lengthy prison sentence if she said that she did not do work for the Assessor's Office; and (8) Fadell threatened Kravas with a civil suit for conspiracy if she would not sign an affidavit that he had prepared.

In our view, this evidence, when considered as a whole, would permit a jury to conclude that Fadell reasonably believed that there was an ongoing federal investigation into his activities as County Assessor; that he reasonably believed that Helen Kravas and Bart Kusmierz would supply information to federal investigators; and that he sought to prevent the communication of such information by intimidating or threatening Kravas and Kusmierz. We therefore find the evidence sufficient to support the appellant's conviction under Counts III and IV.

Fadell next challenges his conviction under Count X on the ground that there was no "pending judicial proceeding" on the date he was alleged to have instructed potential witenesses to remain silent as to their knowledge of the matters under investigation by the grand jury. However, again viewing the evidence in the light most favorable to the government, Glasser, supra, it shows that on April 1, 1977,

Fadell instructed his intermediaries to put into effect a plan of obstructionate conduct, and that those instructions were carried out upon receipt of the grand jury subpoenas on April 6, 1977. We agree with the government that this evidence is sufficient to sustain a conviction under 18 U.S.C. § 1503.

The appellant also claims that the evidence was insufficient to sustain his conviction under Count XIII for the removal, concealment, or destruction of "control cards" that had been subpoenaed by the Special Grand Jury. Essentially, the appellant's argument is that there were no records in the Assessor's Office that were known to him as "control cards." Several employees testified, however, that there were indeed records in the Assessor's Office known as "control cards." When the testimony is taken with the circumstantial evidence of Fadell's activities after he received the subpoenas, and, in particular, the testimony of John Svaco on the removal of the cards from Fadell's office, it is sufficient, in our view, to support a conviction under 18 U.S.C. § 1503 for the destruction of the subpoenaed records.[2]

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[2]In our view, the materiality of documents subpoenaed by a grand jury is a question of law to be resolved by the court in much the same way that it resolves the materiality of false statements in a prosecution for perjury. In this case, we have no difficulty in concluding that the "control cards" were relevant to the grand jury investigation.

Similarly, we find the evidence sufficient to sustain Fadell's perjury conviction under 18 U.S.C. § 1623 for falsely stating to the grand jury that there were no records in the Assessor's Office known as "control cards."

The appellant next makes what amounts to a "multiplicity of counts" claim, arguing that Counts XIII and XV were based on a single course of conduct and hence a single alleged offense. In Count XIII, Fadell was charged with obstructing justice by "destroying" control cards, while in Count XV he was charged with obstructing justice by "altering" control cards. At trial, the government alleged that there were two distinct groups of records; (1) control cards that had been maintained for the years prior to 1973 (which Fadell allegedly "destroyed") and (2) control cards that had been maintained for the years 1973-1976 (which Fadell allegedly "altered").

On the alleged alteration, John Svaco testified that the appellant suggested that the control cards be retyped since they could prove to be very damaging. Svaco further testified that he saw an office employee remove from Fadell's office the control cards for the years prior to 1973. Other government witnesses testified that they saw various office employees retyping other control cards. Viewing this evidence in the light most favorable to the government, Glasser,

supra, we find it sufficient to support a separate conviction under Count XV for the violation of 18 U.S.C. § 1503.[3]

The appellant next contends that the district court erred in granting the government's motion for the severance of co-defendants Marie Samar and Eddie Robinson,[4] and in denying his own motion for a continuance. In essence, the appellant's argument is that these rulings effectively prevented the two co-defendants from testifying on Fadell's behalf at trial. Significantly, however, at the time the rulings were made, there was nothing before the trial court to indicate that the testimony of either co-defendant would be exculpatory in nature.

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[3]We find no basis for the appellant's claim that 18 U.S.C. § 1503 does not reach acts involving tangible evidence that is ordered to be produced before a grand jury. See United States v. Walasek, 527 F.2d 676, 678-81 (3d Cir. 1975).

[4]We have granted the government's motion to lift the seal on the transcripts of hearings held in chambers on this issue, and we find no evidence that the government deliberately withheld from the appellant information relating to the co-defendants' counsel.

Indeed, there was nothing before the court to indicate that either co-defendant would in fact testify. On these facts, we are not persuaded that the court abused its discretion in granting the severance or in denying the motion for a continuance.

Fadell next argues that the lower court erred in refusing to dismiss the indictment on the grounds that it was based on hearsay testimony. However, "(i)t is clear in this circuit that an indictment is not improper merely because it is based on hearsay." United States v. Harris, 521 F.2d 1089, 1091 (7th Cir. 1975); United States v. Wilkinson, 513 F.2d 227, 232 (7th Cir. 1975). To be sure, an "indictment based on hearsay might possibly be subject to dismissal if there is a high probability that no indictment would have been returned had there been eyewitness' testimony or if the grand jury had been deceived as to the type of testimony it received." Harris, supra at 1091. But we find no basis for either of these special exceptions in this case.

The appellant also claims that he did not receive a fair trial because the lower court admitted evidence that was allegedly highly prejudicial. We find, however, that the challenged evidence had a significant probative value. The testimony of the named witness-victims of Fadell's allegedly obstructionate conduct was relevant to the obstruction of justice

charge, for it established that they had information which implicated Fadell in a possible federal criminal tax violation. The testimony of the unnamed witness-victims was also relevant since it indicated that Fadell had implemented a common plan or scheme. Rule 404(3)(b), Fed. R. Evid. Finally, the testimony on the State Board of Accounts hearing was probative because it showed that Fadell was personally directing the scheme to obstruct the federal investigation. We are therefore unpersuaded that the lower court abused its discretion in determining that the probative value of this evidence outweighed its prejudicial effect.

We have examined the appellant's other arguments and find no basis for reversal. The judgment of the district court is therefore AFFIRMED.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

UNITED STATES OF AMERICA	)	
vs.	)	H CR 77-59
THOMAS R. FADELL, MARIE SAMAR, and EDWARD ROBINSON	)	18 USC 2, 1503, 1510, and 1623

The Grand Jury charges:

COUNT I

1. From on or about the 1st day of September, 1976, up to and including the date of this indictment in the Northern District of Indiana, Intelligence Agents of the Internal Revenue Service, United States Department of the Treasury, and Special Agents of the Federal Bureau of Investigation, United States Department of Justice, said agents being duly authorized by said Departments to conduct and engage in investigations of violations of one or more of the following criminal statutes of the United States, that is, Sections 7201 and 7206(1) of the

Internal Revenue Code, Title 26 of the United States Code, of Sections 2, 371, and 1951, Title 18 of the United States Code, and of other cirminal laws of the United States, were engaged in conducting such investigations as so authorized.

2. On or about the 1st day of October, 1976, in the Northern District of Indiana, THOMAS R. FADELL, and MARIE SAMAR, by means of bribery, misrepresentation, and intimidation, willfully did endeavor to obstruct, delay and prevent Bart M. Kusmierz from communicating information relating to violations of the aforesaid statutes to the same agents, who were then conducting and engaging in such investigation, as THOMAS R. FADELL and MARIE SAMAR well knew, by endeavoring to obtain from Bart M. Kusmierz a false affidavit concerning the place and nature of his employment while on the payroll of the Calumet Township Assessor's office, in violation of Sections 2 and 1510, Title 18 of the United States Code.

COUNT II

1. The Grand Jury incorporates by reference herein the allegations contained in paragraph 1 of Count I of this indictment.

2. On or about the 17th day of November, 1976, in the Northern District of Indiana, THOMAS R. FADELL, by means of bribery, misrepresentation, and intimidation, willfully did endeavor to obstruct, delay, and prevent Bart M. Kusmierz from

communicating information relating to violations of the aforesaid statutes to said agents, who were then conducting and engaging in such an investigation, as THOMAS R. FADELL well knew, by causing a threatening letter to be sent to Bart M. Kusmierz, in violation of Section 1510, Title 18 of the United States Code.

COUNT III

1. The Grand Jury incorporates by reference herein the allegations contained in paragraph 1 of Count I of this indictment.

2. On or about the 10th day of January, 1977, in the Northern District of Indiana, THOMAS R. FADELL, by means of bribery, misrepresentation, and intimidation, willfully did endeavor to obstruct, delay and prevent Bart M. Kusmierz from communicating information relating to violations of the aforesaid criminal statutes of the United States, to said agents, who were then conducting and engaging in such an investigation, as THOMAS R. FADELL well knew, by attempting to cause the discharge of the said Bart M. Kusmierz from his place of employment, in violation of Section 1510, Title 18 of the United States Code.

COUNT IV

1. The Grand Jury incorporates by reference herein the allegations contained in paragraph 1 of Count I of this indictment.

2. From on or about the 7th day of January, 1977, to on or about the 18th day of January, 1977, in the Northern District of Indiana, THOMAS R. FADELL, by means of bribery, misrepresentation and intimidation, willfully did endeavor to obstruct, delay and prevent Helen Kravas from communicating information relating to violations of the aforesaid criminal statutes of the United States, to said agents, who were then conducting and engaging in such an investigation, as THOMAS R. FADELL well knew, in violation of Section 1510, Title 18 of the United States Code.

COUNT V

1. The Grand Jury incorporates by reference herein the allegations contained in paragraph 1 of Count I of this indictment.

2. On or about the 1st day of February, 1977, in the Northern District of Indiana, THOMAS R. FADELL, by means of bribery, misrepresentation and intimidation, willfully did endeavor to obstruct, delay and prevent Robert G. Carter from communicating information relating to violations of the aforesaid criminal statutes of the United States to said agents, who were then conducting and engaging in such an investigation, as THOMAS R. FADELL well knew, in violation of Section 1510, Title 18 of the United States Code.

COUNT VI

1. The Grand Jury incorporates by reference herein the allegations contained in paragraph 1 of Count I of this indictment.

2. On or about the 14th day of January, 1977, in the Northern District of Indiana, THOMAS R. FADELL and MARIE SAMAR, by means of bribery, misrepresentation and intimidation, willfully did endeavor to obstruct, delay and prevent Danny Gligor from communicating information relating to violations of the aforesaid criminal statutes of the United States to said agents, who were then conducting and engaging in such an investigation, as THOMAS R. FADELL and MARIE SAMAR well knew, by endeavoring to obtain a false affidavit from the said Danny Gligor as to the place and nature of his employment while on the payroll of the Calumet Township Assessor's office, in violation of Sections 2 and 1510, Title 18 of the United States Code.

COUNT VII

1. From on or about the 14th day of April, 1977, up to and including the date of this indictment, in the Northern District of Indiana, a Special Grand Jury duly empaneled on September 28, 1975, and sworn in the United States District Court for the Northern District of Indiana, was conducting an investigation to determine whether there were violations in the Northern District of Indiana of certain

criminal statutes of the United States, that is, Sections 7201 and 7206(1) of the Internal Revenue Code, Title 26 of the United States Code, of Sections 2, 371 and 1951, Title 18 of the United States Code, and of other criminal laws of the United States.

2. As THOMAS R. FADELL and MARIE SAMAR well knew, the aforesaid Grand Jury duly issued and caused to be served subpoenaes upon witnesses to give testimony, and subpoenaes for the production of records, concerning the matters then pending before the Special Grand Jury as described in paragraph 1 of Count VII of this indictment.

3. On or about the 19th day of May, 1977, in the Northern District of Indiana. THOMAS R. FADELL did corruptly endeavor to influence Danny Gilgor, a witness before the said grand jury, and thereby corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Northern District of Indiana, by threatening to discharge from employment and discharging from employment the said Danny Gligor, in violation of Section 1503, Title 18 of the United States Code.

COUNT VIII

1. The Grand Jury incorporates by reference herein the allegations contained in paragraph 1 of Count I of this indictment.

2. On or about the 1st day of February, 1977, in the Northern District of Indiana, THOMAS R. FADELL and MARIE SAMAR, by means of bribery, misrepresentation and intimidation, willfully did endeavor to obstruct, delay and prevent William R. Covey from communicating information relating to violations of the aforesaid criminal statutes of the United States to said agents, who were then conducting and engaging in such an investigation, as THOMAS R. FADELL and MARIE SAMAR well knew, by endeavoring to obtain a false affidavit from the said William R. Covey as to his place and nature of employment while on the payroll of the Calumet Township Assessor's office, in violation of Sections 2 and 1510, Title 18 of the United States Code.

COUNT IX

1. The Grand Jury incorporates by reference herein the allegations contained in paragraphs 1 and 2 of Count VII of this indictment.

2. On or about the 7th day of May, 1977, in the Northern District of Indiana, THOMAS R. FADELL and MARIE SAMAR, did corruptly endeavor to influence William R. Covey, a potential witness before the said jury, and thereby corruptly endeavored to influence, obstruct and impede the due administration of justice in the United States District Court for the Northern District of Indiana, by directing the said William R. Covey to remain silent as

to matters known to him relating to said investigation, in violation of Sections 2 and 1503, Title 18 of the United States Code.

COUNT X

1. The Grand Jury incorporates by reference herein the allegations contained in paragraphs 1 and 2 of Count VII of this indictment.

2. On or about the 1st day of April, 1977, in the Northern District of Indiana, THOMAS R. FADELL and MARIE SAMAR did corruptly endeavor to influence Danny Gligor, Stanley Kowalewski, Marge Messina, Mike Paulson, John Nauta, John Svaco and others to the Grand Jury known and unknown, who were potential witnesses before the said grand jury, and thereby corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Northern District of Indiana by instructing the said potential witnesses, and causing them to be instructed, to remain silent as to their knowledge of the matters then under investigation, in violation of Sections 2 and 1503, Title 18 of the United States Code.

COUNT XI

1. The Grand Jury incorporates by reference herein the allegations contained in paragraphs 1 and 2 of Count VII of this indictment.

2. On or about the 21st day of April, 1977, in the Northern District of Indiana, THOMAS R. FADELL did corruptly endeavor to influence John Irak, Mike Paulson, Ted Prettyman, John Svaco, Millard Trivonovich, and others to the Grand Jury known and unknown, witnesses and potential witnesses before the said grand jury, and thereby corruptly endeavor to influence, obstruct, and impede the due administration of justice in the United States District Court for the Northern District of Indiana, by endeavoring to obtain from the said witnesses and potential witnesses false statements by means of bribery, in violation of Section 1503, Title 18 of the United States Code.

COUNT XII

1. On or about the 28th day of April, 1977, at Hammond, Indiana, in the Northern District of Indiana, THOMAS R. FADELL, while under oath as a witness in a hearing on a motion to quash a subpoena issued by the September 1975 Special Grand Jury for records and documents of a business known as Sato Company, which motion was filed by and on behalf of the said THOMAS R. FADELL, the said hearing then being heard before the United States District Court for the said District, did knowingly make a false material declaration.

2. At the said time and place, the Court was engaged in a hearing to determine whether noncompliance with the subpoena to produce the records and documents

of Sato Company was proper by the said THOMAS R. FADELL on the basis that the said records and documents were personal papers of the said THOMAS R. FADELL, and not records and documents of a partnership.

3. It was material to said hearing to determine whether or not partnership returns for federal tax information purposes were ever filed for the Sato Company.

4. At the said time and place, THOMAS R. FADELL, while under oath, did testify and declare before the said Court as follows:

Q. First of all, directing your attention to the Sato Company, when was that formed, as best you can recall?

A. Approximately five or six years ago. I don't know the exact date.

Q. At that time, was yourself and your wife involved, is that correct, in the original forming?

A. That is correct.

Q. Did you have other partners at that time?

A. Well, I wouldn't use the word partners, because

that was never a partnership, there was never any partnership agreement, never any partnership returns filed. At that time, I would call it a joint venture with another adventurer.

5. That the said testimony and declarations of THOMAS R. FADELL, as he then and there well knew and believed were false in that partnership returns for federal tax information purposes were filed in the name of Sato Company for and on behalf of THOMAS R. FADELL for the years 1970, 1971 and 1972.

All in violation of Section 1623, Title 18 of the United States Code.

COUNT XIII

1. The Grand Jury incorporates by reference herein the allegations contained in paragraphs 1 and 2 of Count VII of this indictment.

2. On or about the 23rd day of May, 1977, in the Northern District of Indiana, THOMAS R. FADELL and EDWARD ROBINSON did corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Northern District of Indiana in the following manner, that is, THOMAS R. FADELL and EDWARD ROBINSON did remove, conceal and destroy, and cause to be

removed, concealed and destroyed, records of the office of the Calumet Township Assessor, known as control cards, a subpoena for which records had been caused to be served upon the said THOMAS R. FADELL by the said grand jury, in violation of Sections 2 and 1503, Title 18 of the United States Code.

COUNT XIV

1. On or about the 26th day of May, 1977, at Hammond, Indiana, in the Northern District of Indiana, THOMAS R. FADELL, having duly taken an oath before a competent tribunal, to wit: the 1975 Special Grand Jury of the United States of America, duly empaneled and sworn in the United States District Court for the Northern District of Indiana, and inquiring into a matter there and then pending before the said grand jury in which a law of the United States authorizes an oath to be administered, in that he would testify truly, did knowingly make false material declarations.

2. That at the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations within the Northern District of Indiana of the Internal Revenue Code, Title 26 of the United States Code, of Title 18 of the United States Code, Section 1951, and other laws of the United States.

3. That it was material to the aforesaid investigation to ascertain

whether certain records of the Calumet Township Assessor's office known as control cards did exist and to obtain them for purposes of the aforesaid investigation.

4. That at the time and place aforesaid, THOMAS R. FADELL, duly appeared as a witness before the said grand jury, and then and there being under oath as aforesaid testified and declared as follows:

Q. Mr. Fadell, you were also served with a subpoena with respect to in your capacity as Calumet Township Assessor to produce items identified as control cards. Have you produced those records, sir? Do you have those records here with you today, sir?

A. No.

Q. Do such records exist?

A. There's nothing in the Assessor's Office that I know as a control card.

Q. At the time the subpoena was delivered to your, were there control cards in the Assessor's Office?

A. I'll be back, I have to check with my lawyer.

(Exit and re-enter
Mr. Fadell.)

THE WITNESS:

A. There has never been anything that I have known in eighteen and a half years in the Assessor's Office to be called a control card.

5. That the aforesaid testimony and declarations of the witness THOMAS R. FADELL as he then and there well knew and believed were false in that control cards were records of the Calumet Township Assessor's office and were maintained under the supervision of THOMAS R. FADELL, in violation of Section 1623, Title 18 of the United States Code.

COUNT XV

1. The Grand Jury incorporates by reference herein the allegations contained in paragraphs 1 and 2 of Count VII of this indictment.

2. On or about the 1st day of June, 1977, and thereafter, in the Northern District of Indiana, THOMAS R. FADELL did corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Northern District of Indiana, in the following manner, that is, that he did alter and cause to be altered records of the office of the Calumet Township

Assessor known as control cards, which records had been subpoenaed by the said grand jury, in violation of Section 1503, Title 18 of the United States Code.

COUNT XVI

1. The Grand Jury incorporates by reference herein the allegations contained in paragraphs 1 and 2 of Count VII of this indictment.

2. On or about the 2nd day of June, 1977, in the Northern District of Indiana, THOMAS R. FADELL, did corruptly endeavor to influence Sammie Kyles, Roberta Olah, Lena Sapone, Sharon Dixon, Wilma Donaldson, and Sandra Edmond, witnesses before the said grand jury, and thereby corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Northern District of Indiana, by instructing the said witnesses to remain silent as to their knowledge of matters then under investigations by the said grand jury, in violation of Section 1503, Title 18 of the United States Code.

A TRUE BILL:

/s/ Robert L. Whitlock
Foreman

Richard L. Kieser
United States Attorney

/s/ Richard A. Hanning
By: Richard A. Hanning
Assistant United States Attorney

Appendix C

False Facts Found in Court of Appeals Opinion

1. "Fadell became very upset upon learning that David Krevitz had provided a local newspaper... A- 4

2. "...that David Krevitz had provided a local newspaper with an affidavit... A- 4

3. "Fadell prepared...a false counter affidavit" A- 4

4. "Fadell attempted to force the new employer of Bart Kusmierz to fire Kusmierz. A- 4

5. "Fadell revealed to Helen Kravas that he was concerned about a criminal investigation by a grand jury". A- 5

6. "Fadell intimated Kravas that she could receive a lengthy prison sentence if she said that she did not do work at the Assessors Office. A- 5

7. "Fadell threatened Kravas with a civil suit for conspiracy if she would not sign an affidavit he had prepared". A- 5

8. "...on April 1, 1977, Fadell instructed his intermediaries to put into effect a plan of obstructionate conduct, and those instructions were carried out upon receipt of the grand jury subpoenas on April 6, 1977. A- 6

9. "Fadell...for falsely stating to the grand jury that there were no records in the Assessors Office known as "control cards". A- 7

10. "...there was nothing before the trial court to indicate that the testimony of either co-defendant would be exculpatory in nature. A- 8

11. "Indeed there was nothing before the court to indicate that either co-defendant would in fact testify." A- 9

12. "...for it established that they had information which implicated Fadell in a possible federal income tax violation. A-10

13. "The testimony on the State Board of Accounts hearing...showed that Fadell was personally directing the scheme to obstruct the federal investigation". A-10

14. "Helen Kravas (was) Fadell's legal secretary A- 2

15. "Bart Kusmierz, (was) a former employee of the County Assessors Office. A- 2

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a) (1), (3), 82 Stat. 1115.

Appendix D

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

Added Pub.L. 90–123, § 1(a), Nov. 3, 1967, 81 Stat. 362.

Appendix E

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91–452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932, and amended Pub.L. 94–550, § 6, Oct. 18, 1976, 90 Stat. 2535.

Appendix F

No. 79-140

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS R. FADELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-140

THOMAS R. FADELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was insufficient evidence to support his convictions for obstruction of justice and perjury, that the government deprived him of the favorable testimony of his co-defendants, and that the government's chief witness committed perjury.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on three counts of obstructing justice, in violation of 18 U.S.C. 1503; two counts of obstructing a criminal investigation, in violation of 18 U.S.C. 1510; and one count of perjury, in violation of 18 U.S.C. 1623.[1] He

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[1]Petitioner was originally charged in a 16-count indictment. The government withdrew three obstruction of justice counts before the case was submitted to the jury. The jury was unable to reach a verdict on three obstruction of justice counts. The trial court granted judgments of acquittal on three obstruction of justice counts. It also granted a new trial on one perjury count.

was sentenced to three years' imprisonment and fined $25,000. The court of appeals affirmed (Pet. App. A1-A10).

The evidence at trial showed that petitioner (an attorney and businessman as well as the elected assessor for Calumet Township, Indiana) misused the funds of the Assessor's Office to pay salaries to the employees of his private businesses (Pet. App. A2-A7). Acting on the complaint of one of petitioner's employees, the Internal Revenue Service began an investigation of petitioner in October 1976 (Tr. 226-228). Petitioner learned of this investigation and attempted to obstruct it by coercing his present and former employees to refrain from cooperating with the grand jury or to falsely testify that they worked for the Assessor's Office in return for the money they were paid (Pet. App. A2-A7; Tr. 458-459, 572-573, 577-580, 621-623, 635-645, 796-801, 1053-1066, 2538-2540). The grand jury also investigated whether petitioner had underassessed the value of certain commerical property. The evidence at trial showed that petitioner ordered the records of these valuations (known as "control cards") to be altered, and falsely told the grand jury that he was unaware of any items known as "control cards" (Pet. App. A7; Tr. 653-656, 884-885, 888-889, 894-897, 993, 1014-1016, 1198-1200, 1232-1237, 1350).

1. Petitioner contends (Pet. 11-12, 14-20) that the evidence was insufficient to prove that he obstructed justice and committed perjury. These claims are without merit.

a. Contrary to petitioner's claim (Pet. 19), IRS Agent Sadowski testified that the grand jury's investigation of petitioner began on October 14, 1976 (Tr. 226). Thus, petitioner's assertion (Pet. 11-12) that count X of the indictment is invalid because there was no pending investigation as of April 1, 1977, is in error. Petitioner

interfered with this investigation by making arrangements for John Svaco and the other grand jury witnesses to be represented by the same attorney, who, at petitioner's direction, caused them to invoke their respective privileges against self-incrimination (Pet. App. A5-A6; Tr. 572-573, 577-580, 635-645, 796-801, 2538-2540). See *United States* v. *Cioffi*, 493 F. 2d 1111, 1119 (2d Cir. 1974).

b. The evidence also showed that petitioner ordered the destruction of the original "control cards" in the Assessor's Office, directed that new cards be fabricated by his staff, and falsely told the grand jury that the Assessor's Office possessed no business records known as "control cards" (Pet. App. A6-A7; Tr. 653-656, 884-885, 888-889, 894-897, 1014-1016, 1198-1200, 1232-1239, 1350). Contrary to petitioner's claim (Pet. 18), this evidence supports his conviction on two counts of obstruction of justice and one count of perjury (counts XIII-XV). Petitioner's presentation of conflicting evidence (Pet. 18) does not detract from the validity of the verdict, for the jury was free to disbelieve his witnesses, and did so in this case.

c. The evidence of petitioner's attempt to prevent other potential witnesses (counts III, IV, X) from cooperating with the investigation did not relate solely to state offenses (Pet. 15-16). That evidence disclosed that petitioner threatened two former employees, Bart Kusmierz and Helen Kravas, in an attempt to insure their silence (Pet. App. A4-A5; Tr. 458-459, 473, 622-623, 1057, 1059-1061). He also arranged, through a single lawyer, for other witnesses with relevant information to invoke Fifth Amendment privileges. Contrary to petitioner's contention, the evidence of his use of funds from the Assessor's Office to pay his own employees was, as the court of appeals recognized (Pet. App. A9-A10), relevant to show

that the employees had information about petitioner's potential criminal tax violations.[2]

2. Petitioner also argues (Pet. 12-13) that the trial court improperly denied his motion for a continuance that was made on the first day of trial. Petitioner claims that this ruling deprived him of the testimony of his co-defendants, who were severed for separate trial four days prior to petitioner's trial.[3] At the time petitioner moved for a continuance, he claimed that his co-defendants would testify on his behalf, but he did not disclose the substance of their testimony (Pet. App. A8; Tr. 3). Given the tardiness of petitioner's request and his failure to substantiate it with specific reasons, the trial court did not abuse its broad discretion in refusing to grant petitioner a continuance. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).

3. Finally, petitioner argues (Pet. 13-14) that certain tape recordings show that government witnesses committed perjury. His principal claim is that a tape recording of his conversation with John Svaco on June 6, 1977, demonstrates that petitioner did not realize that the records subpoened by the grand jury were known as "control cards." Assuming *arguendo* that this tape (Tr. 2196-2213) is complete and accurate, it still does not aid

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[2]Petitioner's argument (Pet. 17-18) that the only evidence showing his knowledge of the federal investigation was his December 1976 Freedom of Information Act request for his tax file is equally without merit. As the court below noted, petitioner's attempt to have Kusmierz fired and his threat to either sue Kravas civilly or subject her to criminal prosecution also showed his awareness of an investigation (Pet. App. A4-A5).

[3]The government moved more than two months prior to trial (see Gov't Ct. App. Br. Appendix 1, at 3) to disqualify counsel for petitioner's co-defendants on the ground that they had represented the witnesses in the abortive April 1977 grand jury appearances. The court denied this motion, but after a second hearing two days later it severed the co-defendants on their own motion (see *id.* at Appendix 5, at 5). The indictment against them was later dismissed.

petitioner. It clearly shows his attempt to silence Svaco. Moreover, although the tape indicates that "control cards" were designated by several other names as well, four witnesses, not involved in the taped conversation, testified that the records were indeed generally known as control cards (Tr. 884-885, 888-889, 1198-1199, 1232-1237, 1350).[4]

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[4]Petitioner also argues (Pet. 10-11) that the indictment was based solely on the prosecutor's unsworn statements to the grand jury and that no grand jury witnesses implicated petitioner in any crimes. In support of that assertion, petitioner cites a purported admission in the government's brief in the court of appeals. However, the government's brief (Ct. App. Br. 60-64) expressly notes that the indictment was not based on statements from the prosecutor, but rather was based on the testimony of various witnesses including federal investigative agents. *Ibid.* Petitioner's claim of conflict with *Wood* v. *Georgia*, 370 U.S. 375 (1962), and *United States* v. *Hodge*, 496 F. 2d 87 (5th Cir. 1974), is therefore unfounded. The fact that the witnesses before the grand jury testified in part on the basis of hearsay information does not invalidate the indictment. *Costello* v. *United States*, 350 U.S. 359 (1956); *United States* v. *Bertolotti*, 529 F. 2d 149 (2d Cir. 1975).

Petitioner asserts generally (Pet. 14) that the court of appeals found "false" facts. However, the record supports the factual statements that petitioner challenges (Pet. App. C). The evidence showed that David Krevitz gave a statement to a local newspaper reporter, that this upset petitioner, and that he in turn helped prepare a false counter-affidavit for Krevitz's signature (Pet. App. A4; Tr. 929-936, 939-943, 955-965). Moreover, petitioner attempted to have Bart Kusmierz fired by applying pressure through the Assessor's Office (Pet. App. A4-A5; Tr. 621-623, 1053-1066). Petitioner also called Helen Kravas, who had been employed by petitioner as his legal secretary and then worked for his private companies while receiving a salary from the Assessor's Office (Tr. 446-447). In this conversation, petitioner revealed that he was concerned about the investigation and stated to Kravas that she could be liable either criminally or civilly for her receipt of funds from the Assessor's Office (Pet. App. A5; Tr. 456-459, 473). Petitioner's obstructive actions directed to the grand jury witnesses and his false denial of knowledge of the control cards are

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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discussed on page 3, *supra*. The testimony concerning the State Board of Accounts hearing, as the court of appeals observed (Pet. App. A10), amply demonstrated that petitioner devised the scheme to direct the grand jury witnesses to refuse to testify by raising their privilege against self-incrimination—his chief tactic throughout the investigation (Tr. 627-635, 790-795, 818-820, 918-920, 1317-1318). Finally, Bart Kusmierz testified that he received approximately one-third of his salary from the Assessor's Office, even though he did not work there (Tr. 252-255).

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